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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 673

CALIFORNIA SHIPBUILDING CORPORATION (a corporation),

Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and BELLE REBECCA GADDIS,

Respondents.

PETITIONER'S REPLY BRIEF.

MAX THELEN,
GORDON JOHNSON,
111 Sutter Street, San Francisco 4, California,
Counsel for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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PETITIONER'S REPLY BRIEF.

Petitioner files this reply for the purpose of attempting to clarify the nature of the issues that have been developed by the petition for writ of certiorari and brief in support thereof on the one side and the brief for respondent on the other.

JURISDICTION.

Respondents concede that the questions presented are within the jurisdiction of the Supreme Court of the United States (Brief for Resp., p. 2). They content themselves, though, with the contention that the practices followed by the California Industrial Accident Commission conform with the controlling standards of procedural due process of law (Brief for Resp., pp. 18-25).

ARGUMENT.

I.

PETITIONER'S ATTACK WAS NOT UPON THE METHOD OF DETERMINATION PROVIDED FOR BY THE CALIFORNIA STATUTES, BUT UPON THE MANNER IN WHICH THE INDUSTRIAL ACCIDENT COMMISSION HAS COMPROMISED THAT METHOD ON THE GROUND OF EXPEDIENCY.

Respondents devote much of their brief (pp. 16-25) to the argument, made with great conviction, that the California statutes establishing a system of workmen's compensation insurance contain ample procedural safeguards to assure litigants that they will receive that fair and full hearing guaranteed them by the Fourteenth Amendment. The position of respondents is epitomized in their statement that:

> "All that is required is a full and fair hearing and *this is afforded by the method provided for by California law.*"*
>
> (Brief for Resp., p. 24.)

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*Emphasis throughout is ours.

Petitioner made no general criticism of the adequacy of "the method provided for by California law". Our attack was upon the routine, casual way in which a litigant's rights are disposed of by the hearing referees, "reviewing referees", "monitors" and other forms of supernumeraries who have arrogated unto themselves judicial duties and functions which the California statutes expressly require shall be discharged by the Industrial Accident Commission itself.

The California "Workmen's Compensation, Insurance and Safety Act of 1917" (*California,* Stats., 1917, p. 831) was one of the pioneer compensation insurance laws. Modified from time to time, it has remained one of the most progressive of such laws throughout the nation. We sought no quarrel concerning the structure of the California law, conceding that within its framework there are ample provisions by which hearings could be so devised and conducted as to afford procedural due process of law to every litigant.

Our charge is that the respondent Industrial Accident Commission has compromised beyond reason or right with the most fundamental requirements of due process of law. The compromise is excused and apologized for upon the familiar grounds of expediency and an ever-increasing burden of administrative duties. Over a period of twenty-eight years this compromising has increased progressively until in recent years the attempt to comply with even the barest rudiments of due process has been of the most routine nature.

Specifically, the very basis of our petition is that, conceding that "the method provided for by California law" (as respondents refer to it) establishes a method of trial and determination which could afford to litigants due process of law, the carrying out of that method was abortive in the proceeding here being subjected to scrutiny, and the subterfuges resorted to in the interest of expediency so compromised petitioner's rights as to constitute a denial of due process of law.

The method of procedure authorized by the California statutes was sufficient to have afforded us due process of law. The respondent Industrial Accident Commission and its large staff were well aware of the legal precedents that marked out the limits within which their proceedings should have been guided so as to meet the test of due process. That they had no difficulty in understanding the true rules is indicated by the carefully phrased discussion of what constitutes procedural due process of law, as set out at pages 18-25 of their brief.

Thoroughly grounded in the proper limitations of administrative procedure, the California Industrial Accident Commission has established a procedure that it knows to be short of the requirement of due process of law. Its disregard of fundamental legal concepts in this instance is as flagrant as Mr. Justice Ward of the California District Court of Appeal recently found it to be in another field, when he stated in his concurring opinion in

Pacific Employers Insurance Company v. Industrial Accident Commission (1944), 65 A.C.A. 901, 905:

"The commission knows the rule to follow. However, it is that body's view that the commission is right and the courts are wrong. Instead of following the previous court decisions, and permitting the applicant to appeal, the commission has granted an award, thereby forcing the employer or its representative to appeal. *This action permits the applicant and respondent commission to rest comfortably upon the findings and the rule that the determination of the commission on questions strictly of fact is final and not subject to judicial review."*

II.

WHETHER PETITIONER WAS AFFORDED DUE PROCESS OF LAW DEPENDS UPON A CONSIDERATION OF THE MANNER IN WHICH THE MEMBERS OF THE INDUSTRIAL ACCIDENT COMMISSION CONSIDERED AND DETERMINED THE VITAL ISSUE OF PROXIMATE CAUSE.

The vital issue in the proceeding before the respondent Commission was that of proximate cause:

Was the death of Jonas Dulpha Gaddis proximately caused by the alleged act of serious and wilful misconduct on the part of the employer?

It was to that question that the members of the Commission should have directed their inquiry. It was the evidence on that issue that they should have considered and weighed if their conclusion was truly

to be their own independent, conscientious determination.

How well were they able to discharge that obligation? In the specific proceeding, even in light of the "method provided for by California law", in what form and to what extent did they have the testimony available to them for an appraisal and consideration?

It is upon the basis of the answers to those questions that this proceeding must be decided, rather than a wordy discussion of well-understood legal precedents.

Throughout the entire proceedings petitioner has urged that there was no proof of the proximate cause of the death of Gaddis, the employee. We urged that point before the respondent Commission at the earliest opportunity, being upon the filing of the "Petition for Rehearing" (Rec. p. 152). We urged it upon the California District Court of Appeal in our "Points and Authorities Filed in Support of Petition for Writ of Review" (Rec. pp. 9, 19-23). Again, in the "Points and Authorities in Support of Petition for Hearing in the Supreme Court" it was presented (Rec. pp. 192-199).

Our claim that the record was devoid of any satisfactory or substantial proof of the proximate cause of the injury raised a question of fact which, though simple and clear-cut, involved a determination upon an issue in which the scales were very evenly balanced. The situation called for a careful weighing of the evidence before a determination was reached.

The opinion of the District Court of Appeal treats of this contention so as to make it obvious that it was

impressed with the closeness of the question and the need for careful analysis and appraisal of the evidence before reaching a determination and conclusion. That is apparent when one reads the following portion of the opinion:

> "*As we view it, the Commission was required to determine first whether Gaddis fell either in attempting to cross over to the ladderway on his way to the ground or while attempting to return to his work.* All of the circumstantial evidence, and such direct evidence as there was, points to the conclusion that he fell from some point within 20 feet of the ladderway. In crossing that section he would have had to walk on a single plank, or if none was there, climb down five or six feet to the fifth level. *It is doubtful how he was attempting to negotiate the crossing* but there is no doubt that whichever course he took was made necessary by the unfinished condition of the platform. *It is possible that Gaddis may have fallen from the ladderway or from the fifth level after he had reached it in safety,* but the probabilities strongly support the implied finding of the Commission that he fell from a place where the platform was unfinished, and not from some place that was not unsafe or dangerous. But even if other inferences could reasonably be drawn as to the place from which he fell, we are bound to accept the inference which the Commission drew if it is a reasonable and logical one. We regard it as more reasonable than any of the other possible inferences suggested by petitioner or by the proven facts.
>
> *If it is accepted as a fact, satisfactorily established by the evidence, that Gaddis fell while attempting to cross where the sixth level platform*

> *was unfinished,* it is entirely logical to conclude that the immediate cause of his fall was the absence of a completed platform. *This is only to say again that it is more reasonable to believe that he fell while attempting something difficult and dangerous than to believe that he fell after he had safely reached the ladderway or the completed platform on the fifth level.* We find no reason to question the soundness of the finding that the direct and proximate cause of the accident was the violation of the safety order by the employer."
>
> (Rec. pp. 171-172.)

While petitioner does not agree with the conclusion of the justices of the District Court of Appeal we cannot complain of the method by which they reached it. The complete transcript of testimony taken before the respondent Commission was available to the justices, they had heard oral argument on the case, and it is obvious that they personally sifted the evidence and weighed it before reaching their determination.

The same was not true of the respondent Commission's deliberations, if any. They did not have the transcript of the testimony available and no oral argument had been presented. Their sole source of information was the reports of the hearing referee.

III.

RESPONDENTS PREDICATE THEIR ENTIRE CAUSE UPON THE FACT THAT THE MEMBERS OF RESPONDENT COMMISSION HAD AVAILABLE TO THEM THREE REPORTS PREPARED BY REFEREES, BUT THEY FAIL TO POINT OUT WHEREIN ANY OF THE REPORTS CONTAIN ANY STATEMENT OF THE EVIDENCE ON THE CONTROLLING ISSUE.

Stripped of all of its non-essential trappings, respondents' only reply to the petition for writ of certiorari is found in the less than two-page statement set forth at pages 25-26 of their brief.

They contend that the determination of the proceeding here involved was "conducted, both in form and in substance, strictly in accordance with constitutional and statutory requirements".

Respondents' sole attempt to justify the sufficiency of the inquiry pursued by the members of the Industrial Accident Commission rests upon their claim that the Commission considered certain reports prepared by the hearing referee. Their position is stated as follows:

> "After each hearing was held *the referee who presided formulated a report on the evidence adduced at the hearings* which report was dictated by the referee to a stenographer, typewritten by her, and *considered by the Commissioners of the Industrial Accident Commission before the ultimate decision of the Commission was made in the case.*"
>
> (Brief for Resp., p. 3.)

Petitioner respectfully submits that the nature of respondents' real answer exposes the complete weak-

ness of their position. Brevity may ordinarily be a potency in a legal brief, but certainly the vague, inconclusive statements assembled on pages 25-26 of the brief for respondents are no sufficient answer to the fundamental question raised by the petition for writ of certiorari.

The question here presented involves the right of an administrative board to render a decision that amounts to a judicial determination without having either heard or read the evidence, under such circumstances that its only source of information as to the nature of the evidence is what may have been conveyed to it orally by its assistants or "monitors" who did not themselves hear or read the transcript of the evidence, and who in turn had available to them nothing more than a brief written report of the hearings, which report did not contain a summary of the evidence on the vital and controverted issues of fact, but merely listed a resume of the ultimate conclusions and findings of the person who conducted the hearing.

An analysis of respondents' reply discloses that they concede that:

(1) The Industrial Accident Commission members did not hear the case themselves;

(2) The Commission members did not have a transcript of the testimony available when they decided the case;

(3) The Commission members did not discuss the details of the evidence with the referee who heard the case;

(4) At best, the Commission members read or had reported to them certain brief reports of the hearings.

Petitioner concurs in respondents' claim that:

> "The *Morgan* cases themselves, however, are authority for the proposition that the person or body making the final decision in the controversy need not hear personally all of the evidence." (Citing *Morgan v. United States,* 298 U.S. 468, 481.)

Conceding that, where subordinates have taken evidence and prosecuted inquiries there still remains the requirement stated in the identical opinion immediately following the portion cited by respondents, that:

> "There must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

That rule required that the California Industrial Accident Commission *consider and appraise the evidence* in the proceeding involved here. The members of the Commission were required to address themselves to the evidence, and upon that evidence they were required to reach their independent and conscientious conclusion justified by the evidence.

The manner of that inquiry and the true nature of the Commission members' consideration of the evidence is the real test of whether or not, in spite of its measured method, the California statute provides but the hollow mockery of a "full and fair hearing".

The crux of this proceeding, and the question that must be answered, is:

> *Did the hearing referee's reports in truth set forth any sufficient statement of the evidence on the vital issue, so that one who read them alone could base an independent conclusion thereon?*

Petitioner charges that they did not, and bases its application for a writ upon that charge.

To quote the reports at length (as respondents do at pages 4-15 of their brief) without indicating where the vital evidence appears, is no sufficient answer.

To claim that "every statement in them is based on the record" (as respondents do at page 25 of their brief) is no sufficient answer to the charge that the statements, even if true, are inadequate.

To state blandly that "a mere glance at the reports indicates that the proximate cause of the death was that the employee walked off the end of a scaffold" (as respondents do at page 26 of their brief) is but a mild effort to resist petitioner's contention that "the memorandum of the hearing referee is wholly devoid of any reference to the issue of proximate cause" (Petition for Writ of Certiorari, p. 13).

Respondents do no more! That is their reply.

IV.

NONE OF THE THREE REFEREES' REPORTS, WHICH IT IS CONCEDED WERE THE ONLY SEMBLANCE OF A STATEMENT OF THE EVIDENCE AVAILABLE TO THE MEMBERS OF RESPONDENT COMMISSION, CONTAINED ANY SUMMARY OR STATEMENT OF THE EVIDENCE SUFFICIENT FOR THEM TO BASE THEIR OWN INDEPENDENT DETERMINATION THEREON.

Respondents assert, with some showing of assurance, that:

> "* * * *a mere glance at the reports* indicates that the proximate cause of the death was that the employee walked off the end of a scaffold."
> (Brief for Resp., p. 26.)

Petitioner would suggest respectfully that the members of the Industrial Accident Commission are so steeped in the practice of deciding cases on the basis of "a mere glance at the reports" that they fail to apprehend that the rudiments of due process of law require them to do more.

Had they studied the reports with meticulous care in this proceeding it would have been to no avail.

Nowhere in the referees' reports is there to be found any fair summary or résumé of the evidence, particularly on the vital issue of proximate cause. Respondents have not directed the Court's attention to the portion of the reports claimed by them to set forth an accurate summary of the testimony. The reason is obvious: There is no such summary or statement of the evidence in any of the reports.

Mr. Justice Shinn and his associates on the California District Court of Appeal expressly found that the report of the rehearing referee did not include a summary of the evidence. Their opinion so stated:

> *"While the report did not include a summary of evidence, it did state generally the facts as to the condition of the staging and the circumstances of the accident, which were established by the evidence, and it stated as an ultimate fact that the employee's fall resulted proximately from the defective staging."*
>
> (Rec. p. 175.)

The same defect is apparent in each of the other two memoranda upon which respondents predicate their entire cause.

The three referees' reports that respondents rely upon are printed at length at pages 4-15 of the brief of respondent. That the Court may be informed of the circumstances under which each of them was prepared, that attention may be focused upon those portions that appear to attempt to present the issue of proximate cause, and that the weaknesses and defects of each may be more easily exposed, petitioner undertakes the following summary.

(1) The "memorandum on hearing on amended application on serious and wilful misconduct". (Brief for Resp. pp. 4-6; Rec. pp. 165-168.)

This report was dictated by Claud M. Dunn, the hearing referee, on March 8, 1943, the day on which the first hearing on the issue of serious and wilful misconduct had been held.

Referee Dunn was attempting to make a record of the proceedings before him. Petitioner submits that a fair examination of the report will disclose that the following is the full extent of the statements concerning proximate cause:

> "Testified it happened at 7 o'clock. That there were lights there but due to the dimout they couldn't be very bright. That the deceased told him about 7 p.m. that he was going to get a drink and the witness saw him walk down the plankway toward the stairs which was a distance of about 48 feet, the last 16 or 20 of which was the area of the walkway left open by the failure to carry the planks on across."
>
> (Brief for Resp., p. 5; Rec., p. 166.)

(2) The "memorandum on further hearing and decision". (Brief for Resp. pp. 7-12; Rec. pp. 161-165.)

This report was dictated by the same hearing referee, Claud M. Dunn, on the day of the second hearing. Again, he was trying to prepare a statement of the proceedings before him.

Petitioner believes that a fair, but careful, reading of the report will show that the full extent of the statements on the issue of proximate cause are these:

> "It will be noted in that statement that Morkal, who had previously testified as a witness, stated that after deceased left him with the statement he was going to get a drink it was not more than two or three minutes before information was relayed to the effect that the deceased had fallen."
>
> (Brief for Resp., p. 11; Rec., p. 164.)

(3) The "memorandum on order denying employer's petition for rehearing". (Brief for Resp. pp. 13-15; Rec. pp. 157-159.)

This report was prepared by Clell H. McCredie, who is denominated a reviewing referee or rehearing referee. When a litigant asserts that an original decision of the Commission is in error the statute allows him to file a petition for a rehearing. Instead of actually conducting a full hearing themselves, or even reading such petitions in their entirety, the members of the Commission follow the practice of referring them to one of their referees assigned to rehearing work. That referee then prepares a report which is either read by the Commission, or, more likely, briefly reported to them. On the basis of such a brief report they proceed to determine the rights of litigants.

McCredie was the reviewing referee in the Commission's Los Angeles office. If any member of the Commission's staff actually read the "Petition for Rehearing" it was he. It was of this report that the District Court of Appeal found:

> "The commissioners' order denying a rehearing was based upon this report and recommendation."
>
> (Rec., p. 175.)

A studied analysis of the report will convince one that, as the District Court of Appeal held:

> "* * * The report did not include a summary of the evidence, it did state generally the facts as to the condition of the staging and the circumstances of the accident, which were estab-

> lished by the evidence, and it stated as an ultimate fact that the employee's fall resulted proximately from the defective staging."
>
> (Rec., p. 175.)

General statements concerning the conditions of the staging, vague references to the nature of the lighting conditions, ultimate conclusions of the referee, and all such generalized narrative matter, though occasionally interesting, are not helpful in making it possible for the trier of fact to base his independent judgment thereon and still maintain the pretense of having sifted and weighed the evidence.

Divested of all surplusage, the following is the only statement in this final report that even remotely relates to the issue of serious and wilful misconduct:

> "The accident occurred after dark. There was no immediate eye witness to the fall but from the evidence it appears reasonable to believe that, due to the poor lighting which was shown to have existed, applicant fell thru one of the gaps in the planking of the scaffold over which he had to pass. From this it appears the violation was the proximate cause of the death which, in my opinion, completes the case of serious and wilful misconduct." (Brief for Resp. p. 15; Rec. p. 159.)

The report states that: "*from the evidence* it appears reasonable to believe * * *"

From what evidence? Where is the statement of it? Is the determination of an evenly balanced question of fact to be made on that kind of a statement?

If so, then has there been a hearing in a substantial sense within the meaning of the *Morgan* decision (supra)? Can it be said that the officer charged by statute with the responsibility of making the determination has considered and appraised the evidence?

Based upon that report and recommendation the members of the Commission denied a rehearing. Considering its defects and omissions petitioner urges that particularly apropos is the language of another division of the California District Court of Appeal in *Boswell v. Industrial Accident Commission* (1944), 67 A. C. A. 390, 398, when it stated:

> *"We feel confident that not one of the commissioners would have voted against a rehearing in this matter if he had read the full transcript of the proceedings."*

V.

A COMMITTEE OF THE CALIFORNIA LEGISLATURE, APPOINTED TO REAPPRAISE THE FUNCTIONING OF THE INDUSTRIAL ACCIDENT COMMISSION, HAS FOUND THAT THE COMMISSION'S COMPROMISE WITH THE REQUIREMENTS OF DUE PROCESS OF LAW IS THE GENERAL RULE.

Petitioner's protest against the California Industrial Accident Commission's compromise with expediency is not based upon any rare instance or an isolated slip-up on the part of a normally orderly functioning administrative agency.

The respondent commission has so generally operated beyond the pale of due process that approxi-

mately one year ago the California legislature ordered a searching investigation of its processes. The probability that litigants appearing before the Industrial Accident Commission were being deprived of procedural due process of law by reason of its constantly increasing volume of business, and the confusion resulting from a commingling of judicial functions with complicated administrative duties, was recognized by the legislature of California. On January 31, 1944 the assembly adopted unanimously House Resolution No. 58, requesting the Assembly Interim Committee on Governmental Efficiency and Economy to study the procedure of the Industrial Accident Commission. Relevant portions of the resolution stated:

> "Whereas, The industrial development of the State and the increased volume of the work performed by the commission have suggested a *reappraisal of the manner in which the procedure and functioning of the Industrial Accident Commission is affording due process of law and a substantial hearing to all persons appearing before it;* * * * therefore, be it
>
> Resolved, That *this Assembly recommends that there be a reappraisal of the manner in which, under present conditions, the organization and administrative set-up of the Industrial Accident Commission makes it possible to afford due process of law to persons appearing before it.*" (*California* Legislature, Assembly Daily Journal, 3rd Extra Session, 1944, page 139.)

Only a week ago the preliminary report of the legislative investigating committee was filed. It substan-

tiates in every respect, and finds to be a general procedure, every bad practice that petitioner has complained of in the proceedings here involved.

With respect to the charge that the members of the Commission do not in fact weigh and consider the evidence, and that consideration is of the most cursory and routine fashion, the report found:

> "The length and number of sessions of the commission at which cases are determined were referred to herein (approximately two hours, two days a week, at which approximately 100 causes are determined).
>
> "Prior to a commission meeting the monitor, referred to, will, in a short space of minutes, read the report of the trial referee and draw such conclusions therefrom as he believes the issues and facts warrant. To this reaction will be added his view of what the facts and law ought to be in this or similar cases. These views and reactions are then related to the commission and, for the most part, a determination is made thereon. *In the words of one commissioner, referring to type of cases, 'It just goes through like greased lightning'.* The monitor described the exercise of decisional power by the commission thus:
>
> 'Question: Do you think there is any denial of due process in that procedure?
>
> Answer: I do not, for this reason, that *the commission's work is so vast that they have to approve certain actions by the referee—if you will pardon the terminology—blind. They simply cannot go over the individual cases. Any review that is made is just that much better than a blind ap-*

proval.'" (*California* Legislature, Assembly Daily Journal, January 27, 1945, pp. 56-57.)

Finding that the denial of procedural due process of law, of which petitioner complains, is the general rule, the committee's report concludes:

"'Due process of law' can not be compromised on grounds of convenience, expedience or the desire to rid the commission of harassing delay, when the minimal constitutional requirements are either omitted or ignored. One is at a loss to find any authority supporting a conclusion that because the commission, or commissioners, are burdened with other, various and onerous duties that it is, or should be, excused from the constitutional requirement of granting unto each litigant a review of the evidence in a substantial manner. It is clear that having done that there should be no reluctance in making such fact known to the courts.

In the 30 years—which is short in the span of legal procedure—*the commission has been forced, in order to get out its decisions, to temporize and to adopt expedients; but the time has come when the criticism is too general to be overlooked. Expedients result in practical compromises in disregard of judicial procedures. It has, however, been the rule.* * * *

"Procedural due process of law is not a game. It is the life blood of justice under law." (*California* Legislature, Assembly Daily Journal, January 27, 1945, p. 59.)

The legislative report referred to was based upon a lengthy transcript of testimony taken at hearings at

which members of the respondent Commission, reviewing referees, hearing referees, attorneys practicing before the Commission, litigants and others testified. Undoubtedly legislative reforms will follow.

Litigants' rights may be expected to be protected in the future by express direction of the legislature.

Petitioner's right to due process of law is dependent upon a proper exercise of the power of the judicial branch of government. Our petition for writ of certiorari sought that protection.

For the reasons stated the writ of certiorari should be granted to review this decision of the District Court of Appeal of the State of California, Second Appellate District, Division Three.

Dated, San Francisco, California,
February 7, 1945.

Respectfully submitted,
MAX THELEN,
GORDON JOHNSON,
Counsel for Petitioner.